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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JEREMY CALHOUN,

Petitioner

VERSUS

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ET AL,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether there are genuine issues of material fact precluding summary judgment on the question of whether Jeremy Calhoun was an employee.

Whether a genuine issue of material fact exists as to the violation of the Louisiana child labor laws, LSA-R.S. 23:161 and LSA-R.S. 23:163.

The third question is whether the Fifth Circuit decision to dismiss TWT Moulding Company and Wall Moulding, Inc. violates Louisiana Civil Code Article 3492 which provides for interruption of prescription during minority or products liability suits.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties in the court below were Debra Haynes, individually and on behalf of Jeremy Calhoun, plaintiff; Jeremy Calhoun, plaintiff-appellant below and petitioner herein; St. Paul Fire and Marine Insurance Company, et al, defendants; and St. Paul Fire and Marine Insurance Company, TWT Moulding, Inc. and Wall Moulding, Inc., defendants-appellees below and respondent herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Jeremy Calhoun, the petitioner herein, prays for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 10, 1995.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit sought for review, affirm the district court's grant of summary judgment in favor of St. Paul Fire and Marine Insurance Company. A timely petition for rehearing was denied on January 10, 1995.

The judgment of the United States District Court for the Western District of Louisiana, unpublished, but printed in Appendix A of this petition on pages A-38 through A-39, granted summary judgment for St. Paul Fire and Marine Insurance

Company finding that Jeremy Calhoun is an employee of the gallery, therefore, St. Paul Fire and Marine Insurance Company is relieved of all liability. Petitioner's motion to reconsider was denied on January 10, 1995.

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 2101(c). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 12, 1994. (Appendix, page A-1.) A timely Petition for Rehearing was denied on January 10, 1995. (Appendix, page A-3.)

STATUTES INVOLVED

LSA-R.S. 23:161, et seq.

LSA-R.S. 23:162

LSA-R.S. 23:163

Louisiana Civil Code Article 1799

Louisiana Civil Code Article 2315

Louisiana Civil Code Article 3462

Louisiana Civil Code Article 3468

Louisiana Civil Code Article 3469

Louisiana Civil Code Article 3492

28 U.S.C. 2101(c)

Rule 56(c), Federal Rules of Civil Procedure

STATEMENT OF THE CASE

The personal injury/product liability suit was filed in the United States District Court for the Western District of Louisiana on July 22, 1991, by Debra Haynes, individually and on behalf of her minor son, Jeremy Calhoun, pursuant to 28 U.S.C. 1332, diversity of citizenship, as a result of injuries sustained by Jeremy (age 16) while he was

operating a double miter saw owned by his grandparents while he was living with his grandparents. Upon reaching the age of majority, Jeremy Calhoun was substituted for Debra Haynes as party plaintiff in this matter.

Named as defendants in this suit were (1) St. Paul Fire and Marine Insurance Company (hereinafter referred to as "St. Paul"), general liability insurer of Jerry and Helen Haynes d/b/a Haynes Gallery of Monroe, which had in full force and effect a policy of insurance covering Haynes Gallery of Monroe, and (2) Dumas Brothers Machine, Inc. (hereinafter referred to as "Dumas Brothers"), as the manufacturer of the double miter saw which caused Jeremy's injuries. Plaintiff's suit against St. Paul Fire and Marine is based on the negligence of Haynes Gallery of Monroe in

(1) unlawfully employing a minor to operate a power-driven woodworking machine in violation of LSA-R.S. 23:161; (2) failing to provide supervision of a double miter saw; and (3) allowing a minor to operate the double miter saw in violation of LSA-R.S. 23:161.

Suit was filed against defendant, Dumas Brothers Machine, Inc., as the manufacturer of the double miter saw based on a metal plate attached to the saw containing the following inscription:

"TWT - double miter saw
by DU-MA-CO (Dumas Brothers)
Box 106
Lampasas, TX
512-556-5621"

As a result of interrogatories propounded to Dumas Brothers and an impleader action filed by Dumas Brothers on April 24, 1992, against TWT Moulding Company (hereinafter referred to as "TWT") and/or its successor in business,

Wall Moulding, Inc. (hereinafter referred to as "Wall"), plaintiffs learned that Dumas Brothers was not the manufacturer or designer or the miter saw in question, but rather, TWT Moulding Company and/or Wall Moulding, Inc. was the true manufacturer/designer. Dumas Brothers Machine, Inc. filed an impleader on April 24, 1992, joining defendants, TWT Moulding, Inc. and/or its successor in business, Wall Moulding, Inc., as third party defendants alleging it as the manufacturer and/or designer of the double miter saw alleged in plaintiff's complaint. Dumas Brothers stated that the double miter saw in question was made at the request of and pursuant to the instructions of TWT Moulding, Inc. of Brownwood, Texas. It is alleged that Wall Moulding, Inc. has assumed the business, assets, and liabilities of TWT

Moulding, Inc. and thus becomes liable for any amounts for which TWT Moulding, Inc. may be liable in this litigation. Plaintiff thereafter amended its original complaint joining as defendants TWT Moulding Company and Wall Moulding, Inc. as the manufacturer and/or designer of the double miter saw in question May 18, 1992.

Both St. Paul Fire and Marine Insurance Company and Dumas Brothers Machine, Inc., filed cross claims against each other and the remaining defendant, TWT Moulding Company and Wall Moulding, Inc.

A motion to dismiss was filed by TWT Moulding Company and Wall Moulding, Inc., alleging the running of prescription or statute of limitations (one year in Louisiana). Due to the prematurity of this motion, it was later withdrawn by

defendant, TWT Moulding Company and Wall Moulding, Inc.

St. Paul filed a motion for summary judgment. TWT and Wall filed memoranda in support of this motion, while plaintiff opposed such motion. Judge Walter ruled in favor of St. Paul on August 28, 1993, finding that Jeremy was an employee at the time of injuries and is excluded from coverage of the general liability policy of insurance maintained by St. Paul. Plaintiff filed a motion to reconsider, which was denied on September 24, 1993, Plaintiff thereafter filed a second motion to reconsider based on new evidence, which was also denied by Judge Walter on October 26, 1993. Judgment granting St. Paul's summary judgment was signed on December 17, 1993, and entered on December 20, 1993, Plaintiff filed his Notice of Appeal on January 10, 1994.

On October 14, 1993, after the judge ruled in favor of St. Paul on its summary judgment, TWT and Wall filed a motion to dismiss them from the suit. After reviewing memoranda filed by the parties, and the recommendation of the magistrate judge, Judge Walter ruled in favor of the dismissal and judgment was signed and entered on January 13, 1994. The judge's ruling was in disagreement with Magistrate Simon's recommendation. Plaintiff filed his Notice of Appeal timely on January 27, 1994.

The Court of Appeals for the Fifth Circuit, finding no reversible error, affirmed both district court orders in an opinion entered on December 12, 1994. Petition for Rehearing and Certification to the Louisiana Supreme Court was denied on January 10, 1995.

REASONS FOR GRANTING THE WRIT

A motion for summary judgment should be granted if, and only if, the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. Art. 966; Penalber v. Blount, 550 So.2d 577 (La. 1989); Caplan v. Pelican Homestead and Sav. Assn., 542 So.2d 622 (La.App. 5th Cir. 1989). The burden of proof in such a motion is on the mover to establish that there is no genuine issue of material fact. A fact is material if its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. Gotto v.

ARA Living Center, 570 So.2d 1172 (La.App. 5th Cir. 1990). In the instant case, the question of employee versus grandparent/child relationship is a genuine issue of material fact. The second genuine issue of material fact is that the Louisiana Third Circuit has decided a similar case, Ewert v. Georgia Casualty & Surety Co., 548 So.2d 358 (La.App. 3d Cir. 1989), but the lower courts make no reference to the child labor law issue in their decisions.

The court must test the efficacy of a motion for summary judgment by closely scrutinizing the mover's pleadings while treating those of the opposing party indulgently. Andras v. Maintenance Coastal Sales and Service Co., 572 So.2d 338 (La.App. 5th Cir. 1990). Any reasonable doubt as to the existence of material fact should be resolved against

mover in favor of full trial on the merits. Manders v. Singleton, 558 So.2d 772 (La.App. 5th Cir. 1990). The facts in the instant case are crystal clear. Jeremy Calhoun was not treated like any of the other employees of Haynes Gallery; no withholdings nor taxes were paid; payments/benefits were not conditioned on hours worked; no payment was made for the week before the accident, nor for the day of the accident; and, there were never any workers' compensation benefits paid. Therefore, a genuine issue of material fact exists requiring a full trial on the merits.

I. THE ISSUE OF CHILD LABOR LAWS VERSUS THE WORKERS' COMPENSATION AND TORT LAWS ARE SPLIT BY THE APPELLATE COURTS OF LOUISIANA.

The laws regulating employment of minors, commonly referred to as the child

labor laws, are found in Title 23 of the Louisiana Revised Statutes. Section 161 provides that:

> "Minors. . .shall not be employed, permitted, or suffered to work:
>
> * * *
>
> (8) In the operation of power-driven woodworking machines, or off-bearing from circular saws; . . ."

At the time of Jeremy's injuries, the laws also provided that no minor under the age of 16 years shall be employed, permitted, or suffered to work in any gainful occupation at any time, except as otherwise provided under the child labor laws. LSA-R.S. 23:162.

Section 163 further provides that:

> "No minor under the age of 16 years shall be employed, permitted, or suffered to work:
>
> * * *

(2) In, or about, or in connection with power-driven machinery.

(3) In any manufacturing or processing establishment, or in any manufacturing, mechanical, or processing occupation."

These laws were designed to protect minors of tender age from being employed in hazardous employments; and a father or tutor cannot prejudice or waive protection accorded by law. McLaughlin v. Boykin, 127 So.2d 86 (La.App. 1961). The legislature prohibiting employment of children under certain ages in or about power-driven machinery, motor vehicles, etc., had in mind the protection of children from accidents in prohibited fields. New Amsterdam Cas. Co. v. Soileau, 167 F.2d 767 (5th Cir. 1948), cert. denied, 335 U.S. 822, 69 S.Ct. 45, 93 L.Ed. 376.

Prior law precluded an injured minor employee from receiving workers' compensation benefits if injured in the course of performing duties in violation of the above law. Mott v. River Parish Maintenance, Inc., 432 So.2d 827 (La. 1983). The law today allows injured minors working in prohibited employment to receive workers' compensation benefits. Id.

In Mott, a minor was legally employed by defendant, but was later assigned to perform a task prohibited by the child labor law. The minor was injured during the performance of this prohibited task. The Louisiana Supreme Court found the injured minor to be covered by the Louisiana Workers' Compensation Act and that such benefits were his exclusive remedy against his employer.

Noble v. Blume Tree Services, Inc., 94 CW 0589 (La.App. 1st Cir. 1994), held that a minor who is hired in violation of child labor laws, but who is injured while performing tasks permitted by those laws, may not recover in tort, but is limited to workers' compensation as his exclusive remedy.

In Ewert v. Georgia Casualty & Surety Co., 548 So.2d 358 (La.App. 3d Cir. 1989), a minor was illegally employed in logging operations and injured on the first day of the job. The court noted a distinction between (a) minors initially hired to perform prohibited employment, and (b) minors hired to perform legal employment and then later assigned to perform a prohibited task. In situation "b", where minors are hired in compliance with child labor law, but later assigned an activity

prohibited by the child labor law and injured while performing that activity for the employer, Mott controls limiting the injured employee's recovery to workers' compensation. In situation "a" where the minor is hired to perform work in violation of child labor law and injures himself, the injured party has the option to collect compensation benefits or proceed against his employer in tort. Jeremy Calhoun's claim is either compensation benefits or tort remedy as plaintiff's option in accordance with situation "a" and Ewert, since he was hired in violation of LSA-R.S. 23:161, et seq.

Jeremy Calhoun was under the age of 16 when he began working "in, or about, or in connection with power-driven machinery." His initial duties included sweeping and cleaning up around the shop,

including the area around the power-driven miter saw in violation of 23:163(2). These duties also violated 23:163(3) in that the gallery was a manufacturing or processing establishment because of the wood frames manufactured.

Louisiana Revised Statute 23:163 applies to Jeremy because he began performing duties around the gallery business for his grandparents prior to the age of 16. Section 163(2) prohibits minors under the age of 16 from being employed, permitted, or suffered to work in, about, or in connection with power-driven machinery, such as the power miter saw found in the gallery. Furthermore, even after attaining the age of 16, LSA-R.S. 23:161(A) prohibited Jeremy from being employed, permitted, or suffered to work in the operation of power-driven woodworking machines. The distinction

there seems to be that minors under the age of 16 are not allowed to work in any employment having anything to do with power-driven equipment. However, minors sixteen and over may work in employment associated with power-driven machines as long as the minor is not involved in the actual operation of the equipment. Thus, it would have been proper for Jeremy to sweep and clean up around the gallery once he reached 16 years of age, but prior to that time, he was prohibited from working at the gallery business because of the woodworking operations going on. As such, his employment at the gallery was totally prohibited at the time he began working at age 15 and became legal when he reached the age of 16, with the exception of his work performed in operation with the power-driven miter saw at the age of 16.

There are clear and unequivocal distinctions between Mott, Ewert, and Noble, that allow the court to have such a diverse view. In Mott, the court was faced with the controverse situation, i.e., a legally hired minor performing an illegal task at the time of his injury. However, in Noble, the court expressly declined to address the issue of coverage for an illegally hired minor stating:

> "A question has been raised as to whether there is a distinction between the case where the minor is hired in violation of law or where, as here, he is legally hired but required to perform a task in violation of law. While there may be some support for such a distinction, we are not here faced with that issue and express no view on it." Id. at 832 n5.

The Third Circuit, in Ewert, seized upon this footnote when faced with a case involving an illegally hired minor performing an illegal task at the time of

his injury. The court noted some states provide more liberal workers' compensation benefits to illegally employed minors, while others give the injured minor an option to claim workers' compensation or tort damages. Based on policy considerations, the court decided to allow minors to enforce or ignore the contract, at their option, by holding that an employment contract entered into in violation of the child labor law was relatively null. Thus, the plaintiff in Ewert, was allowed to annul the employment contract and proceed in tort.

Plaintiff contends that footnote [FN 6] in Mott "possibly overruled" Matthews v. Buff Hottle Shows, 109 So.2d 261 (La.App. 1st Cir. 1959), Messer v. Bagwell Coatings, 283 So.2d 279 (La.App. 1st Cir. 1973), and the other cases authorized by this court which hold that

the exclusive remedy of an illegally hired minor is workers' compensation. Id. The language of Mott, Noble, and Ewert, is clear and unequivocal. Each particular case deals with a separate issue of fact. In Mott, a minor was injured while performing a legal task even though illegally employed. In Noble, a minor was hired in violation of Louisiana child labor laws, but was injured while performing a task permitted by those laws. In Ewert, the minor was hired in violation of child labor laws, and was performing tasks prohibited by the child labor laws. The Jeremy Calhoun situated is hand-in-hand with Ewert in that Jeremy Calhoun was hired in violation of the child labor laws and was performing tasks that violated the child labor laws. In this instance, the Third Circuit decided to allow minors to

enforce or ignore the contract, at their option, by holding that an employment contract entered into in violation of the child labor laws is relatively null. Ewert v. Georgia Casualty & Surety Co., 548 So.2d 358 (La.App. 3d Cir. 1989).

II. THE SECOND ISSUE OF JEREMY CALHOUN'S APPEAL IS THAT A GENUINE QUESTION OF FACT EXISTS AS TO WHETHER CALHOUN WAS AN EMPLOYEE AT THE TIME OF HIS ACCIDENT.

In the case at hand, the court is called upon to determine whether the relationship between Jeremy Calhoun, the minor grandson of Jerry and Helen Haynes d/b/a Haynes Gallery of Monroe, at the time of the accident, was that of an employer and employee and also whether or not at the time of the accident, if such a relationship existed, was Jeremy performing services arising out of and

incidental to his appointment in the course of his employer's business.

In the case of Arnold v. McConnell, 424 So.2d 402 (La.App. 2d Cir. 1982), the court quoted language from St. Paul Fire and Marine Insurance Company v. Richard, 208 So.2d 35 (La.App. 3d Cir. 1968), wherein the court, finding that the father was an employee of the son, commented:

> ". . .[t]here is no general test which can be applied in all cases to determine whether an employee/employer relationship exists. However, there must be a contract of employment, either express or implied, whereby the services are furnished with the understanding that payment will be made therefor."

The grandfather and grandmother did pay Jeremy Calhoun for the little work he did previous to the week and day of his accident, but not for the week before the accident and not for the day of the

accident. Further, the grandmother had provided room and board, clothes, and a vehicle for Jeremy's use, and it is submitted that the hours were simply a way to keep track of a due to/due from in a family relationship between a grandmother and grandson. Although Jeremy states that his grandmother would pay him $3.00 an hour, this is below minimum wage, there were no withholdings whatsoever, no deductions for employee expenses, and there were no workers' compensation benefits, nor was there any remuneration paid for the week before the accident, as well as the day of the accident. In Caldwell v. Caldwell, 55 So.2d 258 (La.App. 2d Cir. 1950), second rehearing, November 30, 1951, the court found that the son in a workers' compensation claim against his father had not satisfied to the court's satisfaction

the existence of the employer/employee relationship. The court believed that the payment by the father to the son was a substitution of a fixed weekly allowance that allowed the father to keep up with how much his son spent. In the Caldwell case, the father paid the son $35.00 a week and his board, laundry, and means of transportation. The court held in Caldwell that there was no employer/employee relationship and compensation was denied.

It is further submitted to the court that a genuine issue of material fact exists as to whether $3.00 an hour paid to the minor grandson by the grandfather and grandmother was anything more than weekly allowance or advancements on allowance and whether a true employer-employee relationship with a clear definition of control, hours, and

deduction of expenses was present. Reasonable minds could infer that there was nothing more than the grandmother taking care of her 16 year old grandson who lived with her at the time of the accident and had been living with her for some time prior to the accident.

There is also a genuine issue of material fact in the interpretation of St. Paul's policy as to whether coverage would be afforded to a 16 year old grandson who was injured by a power saw on the premises of the gallery/frameshop. The policy excludes employees who are paid workers' compensation and excludes an employer who is liable for workers' compensation. As discussed previously, the law gives Jeremy the choice to sue in tort, thereby releasing the Haynes for any liability under their workers'

compensation scheme. The policy does not exclude grandchildren of the insured. Further, no workers' compensation benefits were ever paid to or on behalf of Jeremy Calhoun.

In both of the above cited cases, Arnold and Caldwell, an injured minor was claiming to be an employee and thus entitled to workers' compensation benefits from the workers' compensation insurer of a parent. In both cases, the claimed compensation was deemed to be a weekly allowance unrelated to the work performed. As such, the minor child was not eligible for workers' compensation. Such is the situation here based on the facts which indicate that the $3.00 hourly paid to Jeremy was nothing more than an allowance by his grandparents, and thus, Jeremy would not be an employee under the workers' compensation scheme.

As such, he is entitled to and is afforded coverage under St. Paul's general liability policy issued to the Haynes.

Under 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The lower court stated that the issue before them was whether there is an issue of material fact as to Jeremy Calhoun's status as an employee of the gallery. If no issue of fact exists as to Jeremy being an employee of the gallery, then the exclusions apply and St. Paul is entitled to summary judgment

as a matter of law. The court found that an employee-employer relationship did exist between Jeremy and the gallery, citing the case of Ermert v. Hartford Insurance Company, 559 So.2d 467, 476 (La. 1990).

Plaintiff submits that it is disputed as to whether he was an employee of the gallery at the time of the accident, and as such, the matter is inappropriate for summary judgment,

A fact is "material" for purposes of summary judgment if it potentially ensures or precludes recovery, if it affects litigants' ultimate success, or if it determines the outcome of the case. Penalber v. Blount, 550 So.2d 577, 583 (La. 1989). Whether or not Jeremy was an employee of the gallery at the time of the accident falls within the above criteria and is thus a "material" fact.

Respondent, St. Paul, suggested that the following four factors are used to determine employment status:

1. Selection and engagement;
2. Payment of wages;
3. Power of dismissal; and,
4. Control.

However, in Newcomb v. North East Insurance Company, 721 F.2d 1016 (5th Cir. 1983), and Arledge v. Royal-Globe Insurance Company, 401 So.2d 615 (La.App. 3d Cir. 1981), the courts have held that no single factor is determinative as to the existence of a master-servant relationship.

Louisiana jurisprudence favors jury resolution of questions for which no single answer is compelled. Newcomb v. North East Insurance Company, 721 F.2d 1016 (5th Cir. 1983). The issue in Newcomb involved a determination as to

whether one of the parties to the suit was an independent contractor or an employee of another one of the parties. Although our issue involves a determination as to whether Jeremy Calhoun was an employee of Haynes Gallery or merely a grandson performing duties and chores for his grandparents and receiving an allowance, the analysis discussed in Newcomb is applicable.

While the Fifth Circuit Court of Appeals found that the right of the employer to control the employee in his performance of assigned tasks evidences a master-servant relationship, they also indicated that no single factor is determinative as to the existence of a master-servant relationship. Newcomb, 721 F.2d at 1017.

In Newcomb, the alleged employee owned and maintained his own truck and

carried his own liability insurance. The alleged employer did not carry the alleged employee on its payroll or deduct income or social security taxes from his pay. The alleged employer did not obtain workers' compensation insurance or pay unemployment taxes on account of the alleged employee. The alleged employer did not dictate the time of day that the alleged employee was to work. Direct supervision or immediate control of the alleged employee was slight.

In the instant case, the grandparents did not deduct income or social security taxes from Jeremy's pay, nor were there any payroll records for Jeremy Calhoun. Haynes Gallery did not obtain workers' compensation insurance to cover Jeremy. Jeremy did not have fixed hours to work, he worked when he pleased. Jeremy was not supervised other than

being provided with a list each day that he reported to the gallery as to what order to fill. His grandparents provided room and board, a vehicle for transportation, bought his clothes, paid for his school supplies, and gave him an allowance based on $3.00 an hour, well below the minimum wage.

The Fifth Circuit further discerned, based on Louisiana jurisprudence, that: (1) when there is a dispute over the actual powers of control possessed by the alleged employer, a question of fact is posed which must be submitted to the jury unless reasonable and fair-minded persons could reach but one conclusion; (2) when the powers of control are undisputed, and there exist no contrary signals as to the nature of the relationship, the question is one of law, properly to be resolved by the judge; and, (3) when the powers of

control are not in dispute, but there are other signals as to the nature of the relationship, the question is one of mixed law and fact, to be submitted to the jury unless reasonable and fair-minded persons could reach but one conclusion. Newcomb, 721 F.2d at 1918-19. (Emphasis added.)

Petitioner submits that the Haynes did possess some control over Jeremy. They were his grandparents and quasi-guardians since Jeremy resided with them. They provided his room, board, and transportation. In addition, they provided the list of work to be done by Jeremy when he returned from school each day. On the other hand, there are facts present which indicate that the Haynes intended something other than a master-servant relationship. These facts include: Jeremy assisting his grand-

parents at the gallery when he wanted to; he did not assist or help if he didn't want to; his grandparents paid him only $3.00 an hour for any work that he did; no income or social security taxes were deducted; and workers' compensation was not procured for Jeremy. These are "other signals" which indicate that Mr. and Mrs. Haynes and Jeremy viewed the relationship as that of a guardian-grandson relationship rather than one of master-servant. These "other signals" are such that the issue in this case becomes one of mixed law and fact, to be submitted to the jury since reasonable and fair-minded persons could conclude that a master-servant relationship did not exist.

Whether the Haynes formally employed Jeremy or not, they did permit or suffer him, while he was a minor, to work in, or

about, or in connection with a power-driven miter saw. This is a violation of the statute and is a form of "fault" under Louisiana Civil Code Article 2315.

III. THE THIRD ISSUE IS WHETHER PRESCRIPTION HAS RUN AGAINST TWT AND WALL.

At the time of petitioner's accident and injuries, Louisiana Civil Code Article 3468 provided that:

> "Prescription runs against absent persons and incompetents, including minors . . .unless exception is established by legislation."

Louisiana Civil Code Article 3492 reads as follows:

> "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained."

Louisiana Civil Code Article 3462, in part, reads as follows:

> "Prescription is interrupted . . .when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. . ."

and Louisiana Civil Code Article 1799 reads as follows:

> "The interpretation of prescription against one solidary obligor is effective against all solidary obligors and their heirs."

The above four articles provide that Jeremy, even though a minor, had a one year time period within which to bring an action against his obligors. However, his suit against Dumas Brothers and St. Paul, filed within the one year time period, interrupted prescription against other solidary obligors, TWT and Wall, such that the joinder of TWT and Wall to this action on May 18, 1992, was proper.

In 1992, the Louisiana legislature amended Louisiana Civil Code Article

3492, adding a third sentence. The entire article now reads as follows:

> "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing products liability actions in effect at the time of the injury or damage."

This amendment to LSA-C.C. Article 3492 provides a legislative exception to the general rule stated in LSA-C.C. Article 3468 that prescription runs against minors. As a result, the prescription period for a products liability action accruing after the effective date of this amendment is one year after the minor reaches the age of majority.

Prescriptive laws are remedial in nature, and are generally accorded retroactive, as well as prospective, application. Small v. Avoyelles Parish Police Jury, 589 So.2d 1132 (La.App. 3d Cir. 1991), writ denied, 593 So.2d 373 and 593 So.2d 374.

Because the suit filed timely against Dumas Brothers and St. Paul interrupted the prescription running against TWT and Wall, Jeremy's cause of action against TWT and Wall had not prescribed at the time of Jeremy's amended complaint joining them as defendants. Thus, the amendment to Article 3492 applies retroactively to this suit. (Emphasis added.)

A statute setting forth a period of limitations, which does not otherwise alter substantive rights, applies to pending cases. Cooper v. Diamond M Co.,

799 F.2d 176, 178 (5th Cir. 1986), cert. denied, 481 U.S. 1048, 107 S.Ct. 2177, 95 L.Ed.2d 834; Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985). This is so, even though the claim accrued prior to the statute's date of passage. Id. While Jeremy's case of action arose in December, 1990, prior to the amendment to Article 3492, the statement is applicable.

When a new law alters the period of prescription, whether it makes it shorter or longer, the doctrine of "proportionate prescription" is applicable. U.S. v. Nebo Oil Co., 90 F.Supp. 73 (W.D.La. 1950), affirmed, 190 F.2d 1003. This rule states that the time which preceded the change is to be reckoned according to the ancient law, and that which followed according to the new law. Henson v. St. Paul Fire & Marine Insurance Co., 354

So.2d 612 (La.App. 1st Cir. 1977), writ granted, 356 So.2d 1006, affirmed and remanded, 363 So.2d 711.

The amendment to the prescriptive period is applicable to any causes of action occurring before the effective date of the statute when the claim was not prescribed on the effective date of the statute and the claim was made before prescription ran. See Doyle v. St. Patrick Hospital, 499 So.2d 704 (La.App. 3d Cir. 1986), writ denied, 503 So.2d 478.

Prior to the amendment to Article 3492, the Louisiana Civil Code provided a one year prescriptive period to plaintiff's cause of action. In applying the amendment of Article 3492 to this case, jurisprudence instructs us to consider the time that ran prior to the amendment. The old law allowed time to run against

the minor, but Article 1799 allowed the filing of suit against a solidary obligor to interrupt prescription against TWT and Wall, such that prescription had not run against them prior to the amendment.

The time period after the amendment is to be considered according to the new law which tolls prescription during minority. Since suit was filed against TWT and Wall prior to Jeremy's 19th birthday, the requirements of the new amendment are met and his claim has not prescribed.

As stated above, the only limitation upon applying this amendment to this matter is whether such application would revive an already prescribed action or strip a party of a vested right. Hall v. Hall, 516 So.2d 119 (La. 1987). In Hall, a minor child was sexually abused before and during 1979. Suit was not brought

during the one year liberative prescription period. The legislature amended Article 3469 in 1983, suspending prescription until the minor reached the age of majority. Suit was brought after this amendment. The Louisiana Supreme Court dismissed the suit because the cause of action had prescribed in 1980 prior to the amendment in 1983. Upholding the suit would have revived an already prescribed action.

The facts in the present case are vastly different; this suit was brought within the one year time period, albeit not against the defendants, TWT and Wall, but against Dumas Brothers, Inc. Because Article 1799 interrupted the prescription running against TWT and Wall, plaintiff's suit against them had not prescribed. As such, upholding this suit against TWT and Wall under the amended Article 3492 does

not revive a prescribed claim as in Hall.

TWT and Wall did not have a vested right at the time of their addition to this suit, thus they are not being stripped of any rights by requiring them to stay in this suit. The only effect of applying the amendment to TWT and Wall is that the prescriptive period which has been interrupted by the filing of suit against the other co-defendants (Dumas Brother and St. Paul, as insurer of the bankrupt grandparents), remains interrupted, even after these other co-defendants are later dismissed.

The events leading up to TWT and Wall's joinder in this suit as defendants is necessary to fully appreciate the following argument. Jeremy Calhoun was injured on December 20, 1990. Suit was timely filed against St. Paul and Dumas Brothers Machine, Inc. on July 22, 1991.

Dumas Brothers Machine, Inc. was named as the manufacturer of the alleged defective saw based on a metal plate attached to the saw containing the following inscription:

TWT - double miter saw
by DU-MA-CO (Dumas Brothers)
Box 106
Lampasas, TX
512-556-5621

On April 24, 1992, Dumas Brothers filed an impleader action against TWT and/or its successor in business, Wall Moulding, Inc., as the manufacturer and/or designer of the miter saw in question. Shortly thereafter, plaintiff received answers to interrogatories from Dumas Brothers indicating that the saw was "fabricated by Dumas Brothers Machine and Ironworks, a partnership for TWT Molding, Inc," As a result, plaintiff

amended his original complaint on May 18, 1992, adding the defendants, TWT and Wall.

On the face of complaint, plaintiff's claims would seem to be prescribed since suit was filed against TWT and Wall more than one year after his cause of action occurred. However, suit was not bought against them originally because of the misleading metal plate affixed to the saw. TWT, an alleged partnership of Dumas Brothers Machine and Ironworks, affixed a misleading nameplate to its saw. Such action prevented plaintiff from discerning the true identity of the designer of the saw and caused plaintiff to sue an innocent party. Suit would have originally been brought against them but for this custom in having the misleading name imprinted on the plate affixed to the miter saw.

CONCLUSION

The basis of Jeremy Calhoun's opposition is that he is not an employee of his grandparents. However, if he is an employee, then his employment was in violation of the child labor law and under the rationale of Ewert, he is entitled to proceed against his employer's liability carrier under tort law.

The legislature has given special protection to minors employed in dangerous activities and employers taking advantage of minor employees for the performance of these dangerous activities are responsible under tort law. Given the fact that the legislature has given special protection to minor employees and that the courts have further protected these minor employees and taken tort

immunity away from the employers in violation of the child labor laws, Jeremy requests this Court to reverse the decision of the lower court.

This Honorable Court is requested to reverse the trial court's decision dismissing Jeremy Calhoun's claims against St. Paul on the basis of:

(1) A violation of the Louisiana child labor law, particularly LSA-R.S. 23:161-163;

(2) The relationship of grand-parents/grandchild vis-a-vis employers/ employee; and,

(3) The rationale found in Ewert v. Georgia Casualty & Surety Co., 548 So.2d 358 (La.App. 3d Cir. 1989), involving minors working around certain dangerous machinery.

The second request is to reverse the trial court's decision dismissing TWT and

Wall. The timely suit against Dumas Brothers and St. Paul, as insurer of the grandparents Haynes, interrupted the running of prescription. Because the Haynes had gone into bankruptcy, plaintiff could not sue them, but a suit against their insurer interrupts prescription as to all joint tortfeasors. The manufacturer of the miter saw is a joint tortfeasor of the Haynes. Thereafter, the amendment of Civil Code Article 3492 providing for the interruption of prescription during the minority of Jeremy further precluded the running of prescription against TWT and Wall. The dismissal of Dumas Brothers and/or St. Paul no longer has any effect on the status of TWT and Wall. Reversing the lower court decision and requiring TWT and Wall to continue as parties in this matter will not revive any

prescribed action, nor will it strip TWT and Wall of any vested right. Furthermore, considering the misleading inscription on the metal plate affixed to the allegedly defective saw and TWT and/or Wall's involvement regarding the fixation of this misleading inscription, should preclude any dismissal on the grounds of prescription.

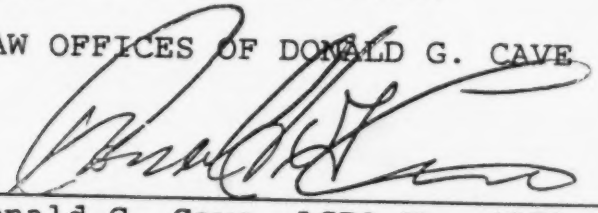
In addition to reversing the judgment in favor of St. Paul, this Court is requested to reach a reversal of the trial court's dismissal of defendants, TWT Moulding Co, and Wall Moulding, Inc., on the basis of Civil Code Article 3492 and the fact that the defendants' inscription on the saw mislead the plaintiff, as well as the timely claim against St. Paul, as insurer of the bankrupt grandparents. In Louisiana, a

suit against the insurer of the tortfeasor interrupts prescription against the tortfeasor.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:

LAW OFFICES OF DONALD G. CAVE



Donald G. Cave, LSBA No. 4073
5721 South Sherwood Forest Blvd.
Baton Rouge, LA 70816-6034
Telephone: 504/292-3194

April 6, 1995.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by placing a copy of same in the United States mails, postage prepaid and properly addressed to:

Mr. Haynes L. Harkey
HAYES, HARKEY, SMITH, CASCIO & MULLENS
Post Office Box 8032
Monroe, LA 71211-8032

Ms. Elizabeth Erny Foote
PERCY, SMITH & FOOTE
Post Office Box 1632
Alexandria, LA 71209-1632

Baton Rouge, Louisiana, this 6th day of April, 1995.

Donald G. Cave

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40071

U.S. Court of Appeals
FILED
Dec. 12 1994
CHARLES R. FULBRUGE III
CLERK

DEBRA HAYNES, Individually & obo Jeremy Calhoun,

Plaintiff

JEREMY CALHOUN,

Plaintiff-Appellant,

versus

ST. PAUL FIRE & MARINE INSURANCE CO., ET AL,

Defendants,

ST. PAUL FIRE & MARINE INSURANCE CO., TWT MOULDING, INC. and WALL MOULDING, INC.,

Defendants-Appellees.

Appeals from the United States District Court for the Western District of Louisiana
(91-CV-1516)

Before POLITZ, Chief Judge, GARWOOD AND BENAVIDES, Circuit Judges.

PER CURIAM:*[1]

Debra Haynes, individually and on behalf of the minor Jeremy Calhoun, appeals an adverse summary judgment in favor of St. Paul Fire & Marine Insurance Co., and the dismissal on prescription basis of her claims against TWT Moulding, Inc. and Wall Moulding, Inc. Having considered the briefs and oral arguments of counsel and the pertinent parts of the record, and finding no reversible error, the judgments appealed are AFFIRMED in all respects.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40071

U.S. Court of Appeals
FILED
Jan 10 1995
CHARLES R. FULBRUGE III
CLERK

DEBRA HAYNES, Individually &
obo Jeremy Calhoun,
Plaintiff,
JEREMY CALHOUN,
Plaintiff-Appellant,

versus

ST. PAUL FIRE & MARINE INSURANCE
CO., ET AL,
Defendants,
ST. PAUL FIRE & MARINE INSURANCE
CO., TWT MOULDING, INC., and WALL
MOULDING, INC.,
Defendants-Appellees.

Appeals from the United States
District Court for the Western
District of Louisiana

ON PETITION FOR REHEARING

(January 10, 1995)

Before POLITZ, Chief Judge, GARWOOD and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied in all things.

ENTERED FOR THE COURT:

s/ Fortunato P. Benavides
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
AUG 30 1993
ROBERT H. SHEMWELL, CLERK
BY s/ SJD
Deputy

DEBRA HAYNES, INDIVIDUALLY AND ON BEHALF OF JEREMY CALHOUN,
plaintiffs

CIVIL ACTION
NO. 91-1516

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY AND DUMAS BROTHERS MACHINE, INC.,
defendants

SECTION "M"
JUDGE WALTER

MEMORANDUM RULING AND ORDER

Pending before this court is Defendant St. Paul Fire and Marine Insurance Company's motion for summary judgment. Plaintiff Jeremy Calhoun and

Debra Haynes oppose this motion. For the reasons that follow, defendants motion for summary judgment is GRANTED.

Plaintiff Jeremy Calhoun is the grandchild of Jerry and Helen Haynes. The Haynes' own and operate the Haynes Gallery, a frame shop in Monroe, Louisiana. Jeremy was 16 and had been working at the Gallery for approximately 2 years. He was paid $3.00 and [sic] hour and was at the Gallery on a regular, part-time basis. One of Jeremy's responsibilities while at the Galley [sic] was to cut moulding to be assembled into frames. This suit arose when Jeremy severely injured his hand while using a saw to cut some moulding.

St. Paul Fire, who provided a comprehensive general liability policy on the Gallery was named as a defendant.

St. Paul has moved for summary judgment dismissing plaintiff's suit against it. The basis of St. Paul's contentions is that, although St. Paul provided a general commercial liability policy on the Gallery, an exclusion in the policy provides that the St. Paul policy does not cover injuries to employees arising in the course and scope of the business. The exclusion, found on page 26 of the policy, provides as follows:

> **EMPLOYERS LIABILITY.** We won't cover:
>
> *Bodily injury to any employee of the protected person for which the protected person may be held liable as an employer or in any other capacity, such as property owner or product manufacturer. ...

St. Paul also submits that another exclusion in the policy also applies:

> **Workers' compensation.** We won't cover any obligation that the protected person has under

> workers' compensation, disability benefits or unemployment compensation law, or any similar law.

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The United States Supreme Court has held that according to the plain language of Rule 56(c), entry of summary judgment is proper

> ...after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a

> situation, there can be no genuine issue as to any material fact, since a complete element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the non-moving party has failed to make a sufficient showing of an essential element of her case with respect to which she has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

The issue before the court, then is whether there is an issue of material fact as to Jeremy Calhoun's status as an employee of the Gallery. If no issue of fact exists as to Jeremy's being an employee of the Gallery, than [sic] the exclusions apply and St. Paul is entitled to summary judgment as a matter of law.

Jeremy was paid $3.00 an hour for his work. He was paid regularly on Fridays, and a record of his hours was

kept on time cards. His particular duties while at the shop were assigned to him by either Mr. Haynes or Mrs. Haynes, owners and operators of the Gallery.

Plaintiffs have opposed this motion by submitting that there is an issue of fact as to whether the $3.00 an hour paid to Jeremy, since it was below minimum wage, when coupled to the fact that no deductions were taken from his pay, was actually a weekly allowance paid by the grandparents to the grandson, since Jeremy was living with the grandparents at the time. To support their position, plaintiffs cite to Caldwell v. Caldwell, 55 So.2d 258 (La.App. 2d Cir. 1950), in which the court of appeals found that an employer-employee relationship did not exist between a father and a son. This claim is without merit. In Caldwell, the

father paid the son a fixed weekly allowance and the son's board, laundry, and transportation. In the instant case, the amount of money Jeremy would receive was based entirely on the amount of time he would spend working at the Gallery, less any advances. Clearly, there was an employee-employer relationship between Jeremy and the Gallery. See Ermert v. Hartford Insurance Company, 559 So.2d 467, 476 (La.1990).

Plaintiffs also submit that since Jeremy had not in fact received any workers' compensation benefits for his injury, the exclusions do not apply. This contention misses the point of both the general liability policy and the exclusions. The policy is designed to protect the Gallery from liability to third parties injured on the premises,

not to protect employees from job-related injuries. Employees are protected by both the workers' compensation statutes and specific workers' compensation policies. Payment in fact of benefits is not required; all that is needed for the exclusion to apply is liability as an employer. As discussed above, such is the posture of the present case. See also LSA-R.S. 23:1021, et seq.

The plaintiffs have failed to controvert any of the defendant's evidence. Because there is no genuine issue as to any material fact, defendant St. Paul Fire and Marine Insurance Company is entitled to judgment as a matter of law.

Judgment in accordance with this Memorandum Ruling will be signed upon presentation to the Court.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 28 day of August, 1993.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 08/30/93
BY sjd
TO: Baldwin
Harkey
Cave
Foote

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
SEPT 24 1993
ROBERT H. SHEMWELL, CLERK
BY: s/ BP
Deputy

DEBRA HAYNES, INDIVIDUALLY AND ON BEHALF OF JEREMY CALHOUN,
plaintiffs

CIVIL ACTION
NO. 91-1516

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY AND DUMAS BROTHERS MACHINE, INC.,
defendants

SECTION "M"
JUDGE WALTER

MEMORANDUM RULING AND ORDER

Before the Court is plaintiff Jeremy Calhoun's motion to reconsider judgment.

Defendant St. Paul Fire and Marine Insurance Company originally filed a

motion for summary judgement. Plaintiff filed a timely opposition on August 2, 1993. Pursuant to a motion granting 20 days to reply to the opposition of the plaintiff, defendants filed a reply memorandum on August 13. On August 28 this Court granted the motion for summary judgement. Plaintiff Jeremy Calhoun now seeks to have this court reconsider that decision. The basis for the motion to reconsider is "plaintiff's belief that the Court rendered its decision prior to its receipt of the Reply Memorandum." The "Reply Memorandum" was filed on August 27.

This Court is quick to note that the "Reply Memorandum" at issue is not the initial memorandum filed in opposition to the motion. The "Reply Memorandum" is plaintiff's response to the defendant's

reply to the plaintiff's opposition to the motion for summary judgment. There is no provision in the local Rules of Court for such a pleading, and there is nothing in the record indicating that the plaintiff was granted leave of court to file this document.

Beyond this, it is abundantly clear from the text of the Memorandum Ruling handed down by this Court that the opposition filed by plaintiff was considered and addressed by this Court. Each submission by both plaintiffs and the defendant was weighed; nothing was ignored.

Plaintiff's motion is denied.

ORDER

IT IS ORDERED that the motion to reconsider filed by plaintiff Jeremy Calhoun is DENIED.

THUS DONE AND SIGNED this 24 day of Sept., 1993, Shreveport, Louisiana.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 09/27/93
BY sjd
TO: Baldwin
Harkey
Cave
Foote

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
OCT 26 1993
ROBERT H. SHEMWELL, CLERK
BY: s/ cag
DEPUTY

DEBRA HAYNES,
INDIVIDUALLY AND
ON BEHALF OF
JEREMY CALHOUN
plaintiffs

versus

ST. PAUL FIRE AND
MARINE INSURANCE
COMPANY AND DUMAS
BROTHERS MACHINE,
INC.
defendants

CIVIL ACTION
NO. 91-1516

SECTION "M"
JUDGE WALTER

MEMORANDUM RULING AND ORDER

Before the Court is plaintiff Jeremy Calhoun's second motion to reconsider judgment. Plaintiff's motion is again denied.

Originally, defendant St. Paul Fire and Marine Insurance Company filed a motion for summary judgment. Despite an opposition by the plaintiff, the motion was granted. Plaintiff filed a motion to have this court reconsider that order. The motion was denied.

Plaintiff has now filed another motion seeking to have the original order dismissing defendant, St. Paul Fire reconsidered. This motion is based on an affidavit from the accountant for the Haynes Gallery. The affidavit provides that plaintiff Jeremy Calhoun did not receive either a W-2 form or a 1099 form from the Gallery, although other people who worked there did. This is submitted to raise an issue of fact as to Jeremy's status as an employee.

Plaintiff's motion is denied. As set out in the original order of this court, there is no question as to the fact that Jeremy worked at the Gallery, was given Gallery-related duties to perform, and was paid regularly based solely on the amount of hours he spent at the Gallery, less any advances. He was an employee of the Gallery.

ORDER

IT IS ORDERED that the second motion to reconsider filed by plaintiff Jeremy Calhoun is DENIED.

THUS DONE AND SIGNED this 25 day of Oct., 1993, Shreveport, Louisiana.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT

DATE 10-26-93
BY cag
TO: Baldwin
Harkey
Cave
Foote

UNITED STATES DISTRICT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
NOV 15 1993
ROBERT H. SHEMWELL, CLERK
BY: s/ tw
DEPUTY

DEBRA HAYNES,
ET AL,
Plaintiffs — CIVIL ACTION

VERSUS — NUMBER CV91-1516-M

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ET AL,
Defendants — JUDGE WALTER
MAGISTRATE JUDGE SIMON

RECOMMENDATION ON MOTION TO DISMISS

Before the Court is a motion to dismiss on the ground of prescription, filed by TWT Moulding Company ("TWT") and Wall Moulding, Inc. ("Wall"). Movants contend that Louisiana's liberative prescription on tort claims of one year bars plaintiffs' recovery against them.

The plaintiff, now Jeremy Calhoun, alleges that on or about December 20, 1990, when he was sixteen years of age, while operating a double miter saw in an art gallery owned by his grandparents in Monroe, Louisiana (hereinafter "the gallery"), the thumb and fingers of his left hand were amputated and severely injured by the saw, because the saw was an unreasonably dangerous product.

The plaintiff originally named Dumas Brothers Machine, Inc., as a defendant, alleging that that company was the manufacturer of the saw and responsible for Jeremy's damages. In addition, the plaintiff sued St. Paul Fire & Marine Insurance Company (hereinafter "St. Paul") as the comprehensive general liability insurer of the gallery, alleging liability of the gallery because

it unlawfully employed Jeremy, a minor, to operate a power-driven woodworking machine in violation of Louisiana law.

On April 24, 1992, Dumas filed a third party demand against TWT and Wall, alleging that the saw in question was made at the request of and pursuant to the instructions of TWT and Wall. Then on May 18, 1992, the plaintiff substituted TWT and Wall as defendants in place of Dumas Brothers Machine, Inc., and on the dame [sic] date, St. Paul filed a cross-claim against Dumas, TWT and Wall for indemnity or, alternatively, contribution. Then on May 27, 1992, Dumas filed a cross-claim against TWT, Wall and St. Paul.

On September 21, 1992, Dumas filed a motion for summary judgment on the ground that Dumas did not manufacture the

subject saw, and that motion was granted by Judge Walter on February 5, 1993. The plaintiff did not oppose the dismissal of Dumas, but TWT and Wall opposed it, alleging that Dumas' name appeared on a plate on the saw in question, and that the fact that that name appeared on the saw created a genuine issue of material fact as to whether Dumas had manufactured the saw. Judge Walter's opinion noted that Dumas had not admitted that its name was on the saw, and that in answers to interrogatories, Dumas reiterated that it had never manufactured, assembled or marketed the saw in question, and that no one had come forward with any affirmative evidence or information to dispute that statement, and granted summary judgment to Dumas. However, Judge Walter declined to certify this summary judgment as a

final judgment under Rule 54(b) of the Federal Rules of Civil Procedure (Docket Items 50 & 52).

On June 25, 1993, St. Paul moved for summary judgment in its favor on the ground that its policy of insurance excluded coverage for injuries to employees of the gallery arising in the course and scope of the business. Judge Walter held that there was an employee-employer relationship between Jeremy and the gallery, that the plaintiffs had failed to show any genuine issue as to any of the material facts underlying that conclusion, so that St. Paul was entitled to judgment as a matter of law (Docket Item #63). Jeremy Calhoun filed two motions seeking to have Judge Walter reconsider his decision as to St. Paul's dismissal, both of which were denied.

The last denial was signed by Judge Walter on October 25, 1993, but the record does not show that any judgment was ever signed pursuant to the granting of the summary judgment to St. Paul.

At the time of the plaintiff's accident, Art. 3492 of the Louisiana Civil Code provided, in pertinent part, as follows:

> "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained."

Jeremy Calhoun alleges that he was injured on December 20, 1990, and he did not file suit against TWT and Wall until May 19, 1992. Therefore, the plaintiff's claims against TWT and Wall would have prescribed before they were sued unless the prescription running against them was interrupted by the filing of suit against

Dumas or St. Paul. Louisiana Civil Code Art. 1799 provides that "the interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs."

The movants contend that the originally named defendants in this suit, Dumas and St. Paul, are no longer defendants in the suit, having been dismissed by separate orders and/or judgments, and that since there are no defendants with whom TWT and Wall could be solidarily liable, the plaintiffs' claims against TWT and Wall should be dismissed as having prescribed.

Plaintiff contends that prescription against TWT and Wall was interrupted when suit was filed against Dumas and St. Paul, because those original defendants were solidary obligors with TWT and Wall,

and that no further prescription ran against TWT and Wall before the date that they were named as defendants in the suit. The plaintiff's contention is correct only if either Dumas or St. Paul actually is a solidary obligor with TWT and Wall, and the answer to that "if" is not yet final.

Judge Walter dismissed Dumas because it denied being the manufacturer or seller of the saw that is the subject of the suit, and no other party had provided any evidence in dispute of that claim. If Dumas, indeed, had no connection with the product which allegedly caused the plaintiff's injury, then Dumas could not be liable to the plaintiff, and, therefore, could never have been a solidary obligor with TWT and/or Wall.

Judge Walter dismissed St. Paul on a finding that St. Paul did not provide insurance to the plaintiff's grandparents for any alleged liability they may have to the plaintiff because the plaintiff was working in the course and scope of employment by his grandparents at the time of his alleged accident, and the policy excluded coverage for liability under such circumstances. If, indeed, the plaintiff was working in the course and scope of his employment for his grandparents at the time of the accident, then St. Paul could not be liable to the plaintiff, and, therefore, could never have been a solidary obligor with TWT and/or Wall.

At this point in the case, however, neither the judgment dismissing the plaintiffs' suit against Dumas nor the

Court's ruling that St. Paul is entitled to judgment as a matter of law, have become final.

Rule 54(b) of the Federal Rules of Civil Procedure provides that when multiple parties are involved in an action, and the court adjudicates the claims of less than all of the parties, unless the court directs the entry of final judgment as to the claims adjudicated, upon an express determination that there is no just reason for delay, and upon an express direction for the entry of a final judgment, then the order or judgment shall not terminate the action as to any of the claims or parties, and the order or the form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims and the

rights and liabilities of all of the parties.

In the case at bar, Dumas specifically sought to have Judge Walter direct the entry of a final judgment as to the dismissal of Dumas, but Judge Walter declined to do so. No judgment yet appears in the record with regard to the dismissal of the plaintiffs' claims against St. Paul.

Even if Judge Walter were to direct the entry of final judgment dismissing Dumas or St. Paul, that would mean that such judgment could be immediately appealed to the Fifth Circuit, and if it were appealed it would still not be final.

Since the dismissals of Dumas and St. Paul are not final, and are subject to revision, there is no certainty that

Dumas and St. Paul will not later be found to be solidary obligors with TWT and Wall. That uncertainty, of course, precludes dismissal of TWT and Wall at this time on the ground of prescription.

The plaintiff also contends that his claims against TWT and Wall have not prescribed because his amended complaint relates back to the date of the filing of his original complaint under Federal Rule of Civil Procedure 15(c).

First of all, it is not necessary to address that claim because of the lack of finality on the issue of possible solidary liability of TWT and Wall with the other parties.

Second, the plaintiff has not presented any evidence to show that TWT or Wall received any actual or constructive notice of this lawsuit before being

served with the amended complaint, and TWT and Wall contend that they had no notice of the proceedings prior to being named as defendants in the suit, and that they are not related or connected to the originally-named defendants. The plaintiff's accident occurred on December 20, 1990, and the amended complaint adding TWT and Wall to the suit was filed on May 18, 1992. Although Rule 15(c) was amended effective December 1, 1991, both the pre-amendment version and the post-amendment version require that a newly named defendant have received some kind of notice of the institution of the action within at least the date prescription ran or 120 days thereafter in order for an amendment changing the naming of the party against whom a claim is asserted to relate back to the date of

the original complaint. Louisiana law makes essentially the same requirement. The plaintiff has not cited any authority whatsoever in support of his contention that TWT and Wall should be held to have had knowledge of the institution of this action before they were served as defendants because they (allegedly) affixed a misleading inscription to the subject product.

For all of the foregoing reasons, IT IS RECOMMENDED that the motion to dismiss of TWT and Wall, on the ground that the plaintiff's claim has prescribed against them, be DENIED because of lack of finality of judgments dismissing all other defendants with whom they could have solidary liability to the plaintiff.

Under the provisions of 28 U.S.C. § 636(b)(1)(C), the parties have ten (10)

business days from service of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge before he makes a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL. THUS DONE AND SIGNED at Alexandria, Louisiana, on this 15th day of November, 1993.

s/ John F. Simon
JOHN F. SIMON
UNITED STATES MAGISTRATE JUDGE

COPY SENT

DATE 11-15-93
BY TW
TO: Baldwin
Foote
Harkey
Cave

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
DEC 21 1993
ROBERT H. SHEMWELL, CLERK
BY: s/ cag
Deputy

DEBRA HAYNES, INDIVIDUALLY
AND ON BEHALF OF
JEREMY CALHOUN,

Plaintiff

CIVIL ACTION
NUMBER 91-1516

VERSUS

ST. PAUL FIRE AND
MARINE INSURANCE
COMPANY AND DUMAS
BROTHERS MACHINE,
INC.

SECTION "M"
JUDGE WALTER

JUDGMENT

The motion for summary judgment filed by the defendant, St. Paul Fire & Marine Insurance Company, having been considered, and for the written reasons set out in the Court's Memorandum Ruling

and Order filed August 30, 1993 and reaffirmed in the Court's Memorandum Rulings and Orders filed September 24, 1993 and October 26, 1993;

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment be granted and plaintiff's suit be dismissed against the defendant, St. Paul Fire & Marine Insurance Company.

THUS DONE AND SIGNED on this 20 day of Dec., 1993.

s/
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Approved as to form:

s/
Donald G. Cave

s/
Elizabeth Erny Foote

s/
Haynes L. Harkey, Jr.

COPY SENT
DATE12-21-93
BY cag
TO: Foote
Cave
Harkey
Baldwin